U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: EAC 03 021 51996 Office: VERMONT SERVICE CENTER Date: MAY 25 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a contamination control engineer at NASA Goddard Space Flight Center, Greenbelt, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The director also found that the petitioner had failed to submit the Form ETA-750B, which is a required part of the application for the exemption.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as an alien of exceptional ability (an issue we shall discuss elsewhere in this petition). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for a national interest waiver, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The petitioner did not submit this form, and the director said as much in the denial notice. On appeal, the petitioner again fails to submit the form, and counsel, in the appellate brief, does not even mention this omission.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg [redacted] (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work:

> [The petitioner] is a cleanroom engineer at the **Goddard Space Center** in Greenbelt MD. Last week (October 6th) she appeared with a group of other engineers on the program **60 Minutes**, with **Ed Bradley**. The program was about **the Hubble Space Telescope**. Another television program may also include her [A&E's *Behind Closed Doors* taped a segment that had not yet aired when counsel wrote this introductory letter]. . . .
>
> The fact that [the petitioner] may appear on National Television [in] two consecutive months underscores her unique position at the Goddard Space Center and in the Hubble Space Telescope Program. **Ultimately, it is [the petitioner] who is responsible for the success of Hubble**. She has experience at Goddard that few people in the world have, and that truly makes her a subject for the National Interest Waiver.

(Emphasis in original.) The record does not include the footage from *60 Minutes* or *Behind Closed Doors*, and therefore we cannot determine the petitioner's prominence in either of those segments. Indeed, counsel had apparently not seen the edited footage from the latter show, because counsel states only that the segment "may include" the petitioner. The record is devoid of evidence that the petitioner, as an individual, has attracted significant media attention for her role in the Hubble Space Telescope (HST) project, which is a collaborative venture involving many other scientists and engineers. A project as complex as the HST involves numerous steps and requires immaculate precision; the record also contains nothing to suggest that the petitioner "is responsible for the success of Hubble" in a way that does not apply equally to countless other scientists and engineers. Contamination is far from the only threat to the HST's continued operation; a faulty computer program or a malfunctioning gyroscope could render the telescope useless.

Counsel provides further information about the petitioner's role in the HST project:

> [The petitioner] is currently employed at the NASA Goddard Space Flight Center (GSFC) as a Contamination Control Engineer for the contracting company, ManTech International. She held this position for over three and a half years. During this time, she has obtained valuable and unique training in the area of contamination control that has enabled her to become a key member in this field. The skills that she developed as a Contamination Control Engineer cover a range of engineering disciplines that are not readily used or found in other work environments. . . .
>
> A large portion of the precision work performed on space flight hardware is completed inside a cleanroom environment. It is [the petitioner's] direct responsibility to ensure that the hardware is protected from any molecular or particle contaminants from the outside environment. She is the task leader responsible for over 60 cleanrooms at GSFC. In this role, she oversees the design, construction and inception of some of these cleanrooms.

Counsel goes on to state that the petitioner's duties require chemical, mechanical, electrical, aerospace and computer expertise.

When evaluating counsel's assertion that the petitioner is "ultimately . . . responsible for the success of Hubble," we must consider that the HST was deployed in April 1990, some twelve and a half years before the October 2002 filing date, but the petitioner had been at GSFC for less than four years when she filed the petition. Clearly, the HST was conceived, built, launched, and produced years of valuable scientific data before the petitioner ever became involved with the project.

Counsel notes that the petitioner's "participation in this program has certainly gained attention in [the petitioner's native] Canada," and speculates that the denial of the petition "might even have adverse international repercussions." This is clearly unsupported conjecture on counsel's part. There is no evidence to suggest that continued good relations between the United States and Canada are, to any perceptible degree, contingent on the outcome of this petition. The only evidence of "attention in Canada" is a single article from a local newspaper.

Counsel states: "It would be ridiculous to run an ad in a journal or newspaper and expect to find someone with the requisite experience to build and maintain clean rooms for the Hubble Space Telescope." We note that the aforementioned newspaper article states the petitioner "applied for her job when she saw it advertised in the Washington Post."

The petitioner submits letters from several witnesses at NASA GSFC and ManTech International Corporation. Wayne Geer, supervisor of ManTech's Cleanroom Operations Group, states:

> ManTech . . . has employed [the petitioner] for 3 years as a Contamination Control Engineer. Her responsibilities include providing engineering support to the cleanroom facilities and projects within those facilities. . . . During her period of employment she has learned a great deal through the experiences and technical exposure she has had. . . . She has progressed beyond the entry-level stage and her departure would put a significant damper on our operations and the efficiency and quality of the support we provide to NASA's GSFC. . . .
>
> The duties of the Contamination Control Engineer are:

- Developing cleaning procedures for unique sensitive and intricate hardware; and understanding the materials in the hardware and the interaction those materials will have with cleaning solutions and solvents like acetone, FREON, IPA, etc.
- Implementing the procedures in a fashion that is most efficient. . . .
- Analyzing cleanroom air flows, understanding the dynamics as the air travels through HEPA filters [through] the room and is recirculated. . . .
- Troubleshooting and assisting with the maintenance of HVAC equipment. . . .
- Operation and analysis using various testing equipment and computers. . . .
- Coordinating and managing contamination efforts as well as interfacing with NASA representatives to determine and establish contamination requirements and implement them with other engineers and technicians.

Michael B. Yachmetz, vice president of ManTech's Aerospace Technology Applications Center, states that the petitioner "has worked with us since May 4, 1999," some 25 days before the petitioner officially received her bachelor's degree from Lakehead University. Mr. Yachmetz deems the petitioner "to be a vital member of this organization and a key member of the Contamination Control Team at Goddard Space Flight Center, who due to the unique qualities of her job would be difficult to duplicate or replace."

Randy J. Hedgeland, a contamination engineering group leader at NASA GSFC, states that the petitioner "is responsible for over sixty cleanroom facilities at Goddard and for ensuring that all team members working within these cleanrooms adhere to our strict contamination control requirements." He asserts: "It would take a minimum of two years to train someone with this kind of knowledge. This would not be feasible due to NASA's budgetary constraints and schedule driven success programs."

Jamie Dunn, integration and test manager for the HST's Wide Field Camera 3, states that the petitioner "is an indispensable member of our Wide Field Camera 3 contamination control team. She is responsible for ensuring that every piece of hardware used to build this instrument meets the strictest cleanliness requirements. . . . If [the petitioner] were not available for this position, our mission would be adversely impacted." Other NASA employees discuss various aspects of the petitioner's job and the importance of cleanroom technology in assembling devices that are virtually free of contaminants.

The witnesses indicate that the petitioner learned many of her critical skills on the job. Their principal argument for the petitioner's retention appears to be that training a new worker to reach the petitioner's present level of competence would result in delays and expense that could be avoided by retaining the petitioner's services.

The director denied the petition, stating that the importance of the petitioner's position is not grounds for a waiver, because the waiver must rest on the alien's individual merits and neither Congress nor the Department of Labor has established a blanket waiver for aliens in the petitioner's occupation. To find otherwise would be to assert arbitrarily that certain positions are, by their very nature, outside the labor certification process, and that U.S. workers qualified for those positions are to be denied the protections offered by that process. Congress clearly intended for the Department of Labor to play a role in such matters; Citizenship and Immigration Services (CIS) has no jurisdiction to usurp, unilaterally, the Department of Labor's authority in this regard.

The director also concluded: "The record contains insufficient evidence that the [petitioner] has developed new methodologies or techniques that have been accepted and implemented by other professionals in her field

or that she, through her individual accomplishments, has otherwise had an impact on the field that has or will be national in scope."

The director also observed that a shortage of workers is not a valid basis for a national interest waiver. As stated in *Matter of New York State Dept. of Transportation* at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background." In addition, while counsel consistently asserts that a shortage of workers with the petitioner's skills is a consideration, *Matter of New York State Dept. of Transportation* specifically rejects that argument. When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise:

> would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Id. at 220-221.

Counsel, on appeal, contests the director's finding that the petitioner's work is not national in scope. To the extent that the petitioner's work contributes to NASA's space program, it is reasonable to conclude that the petitioner's efforts are national in scope.

Counsel maintains that the petitioner has made substantial contributions to her field, and argues that the petitioner "has given invited lectures on the subject, and has appeared in Newspapers and television discussing this subject." The record only shows one invited lecture by the petitioner, at Lakehead University. The petitioner was a student at that university at the time of the lecture. This lecture took place in March 1998, more than a year before she began working for ManTech. Thus, the lecture cannot have been on the subject of her work at NASA. The newspaper article, already discussed above, is a local-interest piece, reporting than an alumna of a local university had begun working on a NASA project. It certainly does not establish that the petitioner was or is a generally recognized expert in her field. As for the television story, all we have is counsel's assertion that the petitioner appeared on *60 Minutes* and "may" appear on another program after the filing date.

We note that NASA is far from the only entity that relies on cleanroom technology; the computer industry, for instance, must manufacture some of its most sensitive components in contamination-free environments. The record, however, is devoid of any evidence that experts in cleanroom technology outside of the petitioner's own projects have taken any notice of the petitioner's work.

Counsel emphatically asserts "THERE IS NO MONEY TO TRAIN ANOTHER cleanliness engineer" (counsel's emphasis). Counsel proceeds from the apparent assumption that the denial of this petition must lead inevitably to the termination of the petitioner's employment. Counsel does not explain what circumstances prevent ManTech from seeking a labor certification on the alien's behalf.

Counsel does tangentially address the labor certification issue, stating that "the Department of Labor is about to institute a PERM labor certification by which it will only endeavor to review labor cert applications in certain professions. . . . [I]t will not waste its time reviewing labor certs that are highly likely to be granted in any case." If counsel is correct that the Department of Labor will, at some future point, relax the guidelines and make it easier to obtain a labor certification, then it would appear that a waiver would become even less necessary. The assertion that it is a "waste [of] time" to review approvable labor certification applications

falsely implies that the purpose of labor certification is to deny benefits to aliens. The process is intended to ensure that employment of an alien will not displace or depress the wages of United States workers, rather than to keep alien workers out at all costs. In any event, we must deal with policy as it exists at present, rather than how it might be in the future.

If a labor certification is "highly likely to be granted" in the petitioner's case, then that is all the more reason to apply for it. Nothing in the statute, regulations, or case law indicates that the national interest waiver is simply a shortcut for aliens who would be likely to receive labor certifications. We stress that the national interest waiver does not in any way put an alien on a "fast track" for permanent resident status or naturalization. In petitions involving labor certifications, the priority date is established by the filing date not of the petition, but of the underlying labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). If the petitioner's skills cannot be duplicated, as counsel claims, then the labor certification would not be "a waste of time." Rather, the process would produce the desired result, i.e., an approved labor certification upon which to base a new petition.

When evaluating the significance of the petitioner's work on the HST project with regard to the national interest, we must take administrative notice of the highly publicized cancellation of the space shuttle mission that was to have serviced the telescope.[1] At present, there are no further manned or robotic service missions scheduled, and therefore there is no foreseeable time in which any new technology developed in the petitioner's cleanrooms could be installed on the telescope.

The petitioner has established that the petitioner is well regarded by her colleagues and superiors at ManTech and NASA; that her occupation is an important one; and that the petitioner obtained most of her specialized skills and knowledge on the job. The petitioner has not, however, demonstrated that it is in the national interest of the United States to waive the labor certification requirement that, by law, typically attaches to the immigrant classification that the petitioner has chosen to seek.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

Beyond the decision of the director, we turn to the question of the petitioner's eligibility for the underlying immigrant classification. The petitioner does not specify whether she seeks classification as an advanced degree professional or an alien of exceptional ability. Nowhere in the record does the petitioner (herself or through counsel) explicitly claim to be an alien of exceptional ability or a member of the professions holding an advanced degree. In the denial notice, the director states that the petitioner "has been shown to have exceptional ability as an engineer." The petitioner having requested appellate review of the director's decision, we shall review this finding by the director.

8 C.F.R. § 204.5(k)(2) defines "profession" as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The same regulation defines "advanced degree" as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A

[1] *See* http://hubblesite.org/newscenter/newsdesk/future/, accessed May 4, 2005.

United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. The occupation of "engineer" is listed in section 101(a)(32) of the Act. Thus, the petitioner is a member of the professions; but the question remains as to whether the petitioner holds an advanced degree.

8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In this instance, the petitioner's highest degree is a bachelor's degree, awarded in May 1999. She does not hold an actual advanced degree, and she received her bachelor's degree only three and a half years before the filing date, making it impossible for her to have accumulated five years of post-baccalaureate experience by the October 2002 filing date.

Because the petitioner, at the time of filing, could not qualify as a member of the professions holding an advanced degree, she cannot qualify for the classification sought (or the national interest waiver) unless she can establish eligibility as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Thus, any evidence that the petitioner offers to establish exceptional ability must be considered in light of whether that evidence demonstrates a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(3)(ii) states that an alien must meet at least three of six listed criteria in order to demonstrate exceptional ability. We discuss these criteria below. The director, in finding that the petitioner qualifies as an alien of exceptional ability, did not discuss the criteria; the director simply offered the conclusion that the petitioner qualifies for the classification sought.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.*

The petitioner received a "Diploma of Technology" for completing "three year Chemical Engineering program" at Cambrian College in June 1994, and a Bachelor of Science degree in Chemical Engineering.from Lakehead University in May 1999. The petitioner cannot meet this criterion without showing that most engineers do not have bachelor's degrees. Absent such a showing, there is no reason to believe that the petitioner's highest degree, a baccalaureate, places her significantly above others in the field in terms of academic background. The petitioner has not submitted sufficient evidence to satisfy this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.*

The record is silent regarding the petitioner's employment before May 1999, and thus it documents less than four years of employment for the petitioner.

A license to practice the profession or certification for a particular profession or occupation.

The petitioner has not claimed any license or certification, nor shown that this criterion is applicable.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The petitioner offers no evidence that her pay ($937 per week, or $48,724 per year) significantly exceeds the mean or median pay rate ordinarily encountered in her field.

Evidence of membership in professional associations.

The petitioner submits evidence of membership in the National Society of Professional Engineers and the Institute of Environmental Sciences and Technology. The record also indicates that the petitioner signed an "Obligation" before the Corporation of the Seven Wardens, "Custodians and Guardians of The Ritual of the Calling of an Engineer." It is not clear if this entity is a professional association.

The other named organizations appear to be professional associations. That being said, we must consider these memberships in light of whether they establish a degree of expertise significantly above that ordinarily encountered in the field. If an association accepts every qualified professional in a given field, or has a minimum entry threshold that most professionals in a field can easily meet, then it is axiomatic that such a membership is in no way indicative of a degree of expertise significantly above that ordinarily encountered in the field.

Because the record contains nothing to show that membership in the above associations requires a degree of expertise significantly above that ordinarily encountered among engineers, the evidence of record is not sufficient to meet the relevant criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

A "Certificate of Appreciation" documents the petitioner's "Invited Lecture for the 6th Annual Chemical Engineering Conference" in March 1998. The certificate was issued by the Department of Chemical Engineering at Lakehead University, where the petitioner was apparently studying at the time. The record offers no other information about the lecture or the conference.

Counsel states: "In three years at NASA, [the petitioner] has earned an amazing number of awards and certificates. Some of these are monetary. Please see Appendix G." Appendix G documents two performance incentive awards from ManTech, for $700 in 2000 and $1,000 in 2001. Neither the petitioner's alma mater nor her employer constitute the petitioner's peers, governmental entities, or professional or business organizations, and the certificate and awards have not been shown document achievements or significant contributions to the industry or field.

With regard to the petitioner's performance reviews, counsel states that the petitioner "has NEVER received less than the highest performance review. See Appendix H" (counsel's emphasis). Appendix H contains a

July 1999 evaluation in which the petitioner received marks for several performance factors. The possible rankings are "EE" ("Exceeds Expectations"), "ME" ("Consistently Meets Expectations"), "NI" ("Needs Improvement"), "U" ("Unacceptable"), and "NA" ("Not Applicable"). The petitioner received five "EE" marks and sixteen "ME" marks. A later evaluation from July 2001 contains 13 "EE" marks, 11 "ME" marks, and one split ranking between "EE" and "ME." These marks, while not unfavorable, clearly do not represent the highest possible rating as counsel claims. Even a single mark below "EE" is sufficient to categorically disprove counsel's claim that the petitioner "has NEVER received less than the highest performance review."

Upon careful review of the above evidence, we cannot affirm the director's finding that the petitioner "has been shown to have exceptional ability as an engineer."

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Also, as discussed above, we have affirmed the original grounds for denial. Therefore, these new findings discussed in addition to the director's findings do not alter the outcome of the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.